

# EXHIBIT 3

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1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS  
3 BOSTON DIVISION  
4 IN RE: PHARMACEUTICAL .  
5 AVERAGE WHOLESALE PRICE .  
6 LITIGATION . 01-CV-12257-PBS  
7 . Monday, September 19, 2005  
8 . Courtroom 25  
9 . 1 Courthouse way  
10 . Boston, MA. 02210

11  
12 TRANSCRIPT OF MOTIONS

13 BEFORE THE HONORABLE MARIANNE B. BOWLER  
14 UNITED STATES DISTRICT MAGISTRATE JUDGE

15  
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# I N D E X

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3 Hearing re docket:

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5 No. 1581 - 4

6 No. 1597 - 33

7 No. 1601 - 34

8 No. 1621 - 40

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9 No. 1623 - 41

10 No. 1634 - 53

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1 Monday, September 19, 2005

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4 THE CLERK: Today is Monday, September 19, 2005.

5 The case of In Re Pharmaceutical Industry Average Wholesale

6 Price Litigation, Civil Action No. 01-12257 will now be

7 heard before this Court.

8 will counsel please identify themselves for the

9 record.

10 MR NALVEN: Good morning, your Honor. David

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20 motion to compel the deposition of Erik Schultz.

21 MS. HARRIS: Your Honor, that motion has actually  
22 been withdrawn, I believe by plaintiffs without prejudice  
23 because Mr. Schultz appeared for his deposition. We did not  
24 represent Mr. Schultz, but I wanted to give the Court the  
25 information.

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1 THE COURT: Was it withdrawn by motion?

2 MS. CONNOLLY: Yes, your Honor, by an unopposed  
3 motion.

4 THE COURT: All right.

5 So that takes us to 1623, which is the motion to  
6 compel the supplementation.

7 Mr. Hobart.

8 MR. HOBART: Thank you, your Honor.

9 1623, your Honor, for clarification for the  
10 record, is defendant's motion to compel production from the  
11 plaintiff states of Nevada and Montana.

12 THE COURT: I'm sorry. All right. In the  
13 alternative. All right.

14 MR. HOBART: Your Honor, if -- if the Court has  
15 the defendant's motion in front of it, I think that would  
16 probably be the easiest way to work through some of this.

17 THE COURT: Well, the easiest would be to get it  
18 on the screen [computer]. You can start while I'm pulling  
19 it up.

20 MR. HOBART: Sure.

21 Your Honor, very briefly, this is -- came before

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22 the Court to argue discovery issues. Certainly would not  
23 be my personal preference, and it's not the preference of  
24 the company I represent, GlaxoSmithKline, but we're here  
25 today with a discovery cut off of January 31st, 2006, you

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1 know, four or five months away. We served discovery on the  
2 defendant states of Nevada and Montana at the beginning of  
3 May. We have received absolutely nothing from the state of  
4 Montana, not a single interrogatory answer, not a single  
5 piece of paper, just empty promises, absolutely nothing.

6 with respect to the state of Nevada, who Hagens  
7 Berman represents as private counsel, we received two boxes  
8 of documents. One box of documents was a printout of the  
9 state's web site. The other box of documents was an  
10 assorted collection of documents that were, you know,  
11 responsive to the discovery requests served by the  
12 defendants.

13 The plaintiff state of Nevada promised and  
14 represented during a meet and confer that took place on  
15 June 20th they would provide answers to interrogatories by  
16 July 8th. It's September 19th; we're still waiting. And  
17 there's been no good explanation for why we're still  
18 waiting for those interrogatory answers.

19 Now, the plaintiffs' response are, you know,  
20 paraphrasing, we're a small state, we're trying to work  
21 through the process. And that's -- that's fine, but we're  
22 -- we're here, we're running out of time. And the reason  
23 we're here is we need to work with the Court to get this on

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24 a schedule. We -- we are willing to work with the  
25 plaintiffs to make our own resources available to review

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1 documents. If the issue is they don't have the resources  
2 to review large collections of documents, we'll bring  
3 resources to the table to do that, to work with the states  
4 to make it happen, but need the documents pretty soon to  
5 take the depositions that we need to take because we intend  
6 to abide by the January 31st, 2006, discovery cut off.  
7 It's reasonable and there's plenty of time to work through  
8 this, and for a lot of things that we're going to talk  
9 about today, for the pace of production issues, you know,  
10 we stand ready to be flexible, to apply resources to get  
11 the job done, and we'll work with the plaintiffs in that  
12 fashion.

13 Part of the frustration here is for a lot of  
14 documents, the response is, "well, it's too -- the  
15 categories are too broad." We're not looking for every  
16 physical piece of paper with a prescription written on it.  
17 And there are certain categories of documents that the  
18 typical way you work through these issues, you know, "Do  
19 you really want the stuff? Here's ten examples you can  
20 look at, and you can negotiate from there whether you  
21 really need it or you really don't." There hasn't been any  
22 of that type of exchange. And it's really, you know,  
23 astonishing that a state can bring a case, and  
24 two-and-a-half years later not produce a single piece of  
25 paper. But, again, we're not here to -- that's the state

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1 of affairs, that's the state of play, and we'll be as  
2 flexible as we can to work through it.

3 The other kind of broader issue, like separate  
4 from the individual requests, is a date issue in terms of  
5 the relevant time period, and the defendants are looking  
6 for a very discrete category of documents that goes back to  
7 1985 -- the year I graduated from law school, 150 years ago  
8 [laughter].

9 But we're not looking for claims filed going back  
10 to 1985. We're not asking the plaintiffs to go back to a  
11 warehouse and search hundreds and hundreds and hundreds of  
12 boxes of documents.

13 There's a very practical way to go about this.  
14 And the reason why we're looking to this discrete category  
15 is it goes to the states' knowledge. You know, they -- in  
16 the Medicaid world, the states elect or set their  
17 reimbursement rate, their top line number reimbursement  
18 rate for drugs. A lot of states use AWP. It is usually  
19 AWP minus a percentage, or in Massachusetts, it's WAC or  
20 actual acquisition costs plus a percentage. So there's  
21 different formulas, and the states have discretion as to  
22 how they set their reimbursement rates.

23 And the reason why we're interested in 1985, there  
24 was a government report that was issued in September of  
25 1984 that basically told the states, instructed the states,



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1 "You are overpaying for your Medicaid drugs by tying the  
2 reimbursement rate to AWP." So to the extent that this is  
3 a fraud case and the states are claiming they were  
4 defrauded by AWP and the way AWP was set, there's a pretty  
5 strong argument, very strong argument, they are on notice  
6 in 1984 that that reimbursement rate was too high or could  
7 be too high. Another government report came out in 1989  
8 that basically repeated the caution or warning and  
9 direction contained in the 1984 report.

10 So what we're looking for is documents that would  
11 relate to the knowledge of the states regarding those --  
12 the selection of the AWP for reimbursement rate. And I  
13 think the practical way to approach this is to look at who  
14 worked at the state Medicare bureaus with the  
15 decision-making authority to set the reimbursement rate,  
16 and search a very discrete number of files related to those  
17 easily identifiable individuals. It's not a blunderbuss  
18 search; it's very focussed and it's for a very specific  
19 purpose.

20 THE COURT: It seems to me you can narrow it a  
21 little bit by telling them exactly what kind of documents.  
22 I mean, whether it's correspondence between these people,  
23 and, I mean --

24 MR. HOBART: We can do that, and we'd be happy to  
25 do that. It is correspondence, minutes of meetings,

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1 reports, budget analysis, that sort of thing, within, like,  
2 the core decision making group of the two states. It's not  
3 the claims filed, that sort of thing.

4 THE COURT: Exactly. If you can narrow the  
5 category.

6 MR. HOBART: And what we need to really get to  
7 work on this issue is from the plaintiffs the list of their  
8 decision makers so we can try, you know, limit the number of  
9 sources that we have to go to to look at their files,  
10 because in the document --

11 THE COURT: The list of decision makers in the  
12 time period 19?

13 MR. HOBART: Eighty-five forward.

14 And we would be happy to provide, like, a very  
15 specific list of documents, the types of documents that we  
16 would be looking for to do that.

17 And, again, if it's a situation where those, you  
18 know, those documents have been archived and you have a lot  
19 of boxes of documents, they can pull those back from  
20 archives, we'll have our people go through them if that  
21 would be of any help to the states.

22 THE COURT: All right. What is your response?  
23 Two-and-a-half years, no documents.

24 MR. NALVEN: Your Honor, I'm David Nalven again,  
25 and I represent the Attorneys General of the states of

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1 Nevada and Montana in connection with this motion.

2 It's interesting to hear the dialogue between you  
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3 and Mr. Hobart now as to specific categories of documents  
4 within the very broad categories that were set forth in the  
5 request that itself set forth 56 categories of documents  
6 that the defendants served on the states of Montana and  
7 Nevada in May 2nd.

8 The -- there have been multiple communications  
9 between my co-counsel, my partner in Seattle, and counsel  
10 for the defendants within the last two weeks, including a  
11 meet and confer session that I think was extraordinarily  
12 productive last Wednesday in which I participated. There  
13 are also one if not two conferences that are set up for  
14 this week --

15 THE COURT: Well, then why am I hearing this? I  
16 mean, are you close to resolving it on your own?

17 MR NALVEN: Your Honor, our view is that the  
18 motion is premature, that the parties are working closely  
19 together to resolve these issues. And I would recommend,  
20 your Honor, that the motion be dismissed without prejudice  
21 to be renewed in 30 days if the parties aren't able to reach  
22 agreement with respect to the few outstanding issues that  
23 exist.

24 THE COURT: Do you think you are close,  
25 Mr. Hobart?

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1 MR. HOBART: I think what Mr. Nalven is referring  
2 to is, like, some of the categories we are actually moving  
3 forward in terms of producing data that may be maintained by  
4 a third-party, like First Health; but there are other

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5 categories that they are just flatly refusing to produce  
6 documents which I think we should address today while we're  
7 here.

8 My caution with 30 days is that we've been -- this  
9 process of receiving these promises that haven't been kept,  
10 you know, 30 days becomes 60 days becomes 90 days, we're at  
11 Thanksgiving and the discovery cut off is January 31st. So  
12 I'm, you know, in agreement that we have had a series of  
13 meetings, and we are making some progress in terms of  
14 narrowing the issues, but --

15 THE COURT: Well, let's go through the categories  
16 that they totally refuse.

17 MR. HOBART: There are three categories, your  
18 Honor, I should just take off the table which we are  
19 satisfied with the promises, and, again, it's a  
20 pace-of-production issue, and those categories that are not  
21 at issue today are Request Nos. 4, 5 and 8.

22 THE COURT: All right.

23 MR. HOBART: Now, Request No. 2 requests for  
24 documents related to the Medicaid rebate program, the, uh,  
25 the Federal Medicaid Rebate Program. And just very briefly,

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1 your Honor, the reason why those documents are relevant, put  
2 apart -- the AWP reimbursement rate is the top line.  
3 There's also a formula where states get rebates back under  
4 the Medicaid Rebate Statute from the companies, there's an  
5 average manufacturer's price, which, for most drugs, is the  
6 equivalent of WAC minus 2 percent, less the best price or

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7 lowest price offered anywhere in the marketplace. The  
8 companies have an obligation to report that lowest price to  
9 CMS or HCFA. The difference between AWP and best price  
10 becomes the unit rebate amount. There is a cost-of-living  
11 adjustment that's multiplied through that; and for every  
12 unit of utilization times the unit rebate amount the states  
13 get the money back from the companies directly every  
14 quarter.

15 So one of the reasons this is relevant is in terms  
16 of the damages analysis. Our position is -- and I don't  
17 think it can even be denied -- you need to net out the  
18 rebates that are returned on the back end from whatever  
19 manipulation they claim on the top -- the top line of the  
20 AWP.

21 So we have been in discussions with the plaintiffs  
22 with Request 2 and with Request 6, and I believe they are  
23 in agreement to provide us with the utilization data and  
24 some of their claims data.

25 But we also -- and we will continue to work with

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1 the plaintiffs -- but there are other narrower categories  
2 of documents that we're interested in, in terms of the  
3 budgeting process, the forecast for these rebate amounts,  
4 any correspondence to the federal government about the  
5 rebate program generally. Those are all categories of  
6 documents that we're interested in, and which I believe the  
7 plaintiffs are now beginning to come around to the view  
8 that we're entitled to those.

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9 THE COURT: Well, it seems to me that there is  
10 some give and take here, and that they are coming around.  
11 So I -- I think I will go with the 30 days.

12 MR. HOBART: Yeah.

13 And just two -- two other categories where the  
14 plaintiffs are just flatly, uh, flatly denying, refuse to  
15 produce documents.

16 Requests 26 and 52. Twenty-six -- actually, I'm  
17 sorry, there are three categories. Request No. 3, your  
18 Honor, deals with the equal access provisions in the  
19 federal statutes. And the defendants have evidence that in  
20 other states, North Carolina, Massachusetts in particular,  
21 and there's a series of lawsuits against other Medicaid  
22 agencies, that the proposition is that the reimbursement  
23 rates need to be higher in order to attract pharmacies to  
24 participate in the Medicaid Program. So it's -- again, it  
25 ties back into the states' knowledge.

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1 So what we're looking for is evidence that the  
2 state intentionally maintained their reimbursement rates at  
3 a higher level in order to increase or to comply with the  
4 equal access provisions to invite or to make -- make sure  
5 sufficient pharmacies participate. Again, it's a discrete  
6 category of documents relating directly to one of the key  
7 issues in our defenses, which is what did the state know  
8 about the nature of AWP.

9 And then for the Court's information, again, North  
10 Carolina has publicly said that they relied on equal access  
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11 provisions to maintain their reimbursement levels at or  
12 around AWP. And Massachusetts, in a case in the First  
13 Circuit, again, relied on that defense and the lawsuit it  
14 brought against it for providing equal access.

15 THE COURT: All right. Well, what about the  
16 documents in Request No. 3?

17 MR NALVEN: Your Honor, we had a very specific  
18 discussion about this category of documents in the meet and  
19 confer session last Wednesday. To begin with, even if there  
20 is some suspicion in the states of North Carolina and in the  
21 Commonwealth that, uh, that lobbying by pharmacists,  
22 lobbying in connection with equal access provisions, caused  
23 the state legislatures in those states to adopt a certain  
24 AWP reimbursement scheme, there is absolutely nothing to  
25 suggest that any of that occurred in the states of Nevada

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1 and Montana. So it's a highly attenuated relevance  
2 argument.

3 Now, in terms of the burden of looking for these  
4 materials, we have actually inquired in the state -- at  
5 least I can represent for sure in the state of Nevada, is  
6 there an equal access officer? Is there a repository of  
7 documents concerning equal access compliance? And as far  
8 as we know at this point, there is no such place.

9 So the burden of looking for these documents is  
10 really extraordinary. In connection with our meet and  
11 confer on Wednesday, it was asked of defendant's counsel,  
12 "You folks are involved in litigation with large states,

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13 California, Illinois, Texas, Pennsylvania, New York. Do  
14 you have experience that can tell us where in those  
15 organizations a file of equal access documents resides?  
16 Tell us the function in those offices, and we will look in  
17 the file of Nevada and Montana and see whether we have such  
18 a file."

19 But simply to look through all of the documents in  
20 any possible functionary office is -- is an extraordinary  
21 burden, and given the highly attenuated relevance to Nevada  
22 and Montana, we think the request is improper.

23 THE COURT: Well, I think I'm going to withhold my  
24 ruling at this time, because it sounds to me like a lot is  
25 going to be produced, and you are making some progress. So

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1 I'm going to deny this motion at this time without prejudice  
2 to be renewed in 30 days, if, in fact, you find you really  
3 need these documents, Mr. Hobart.

4 MR. HOBART: Yes, your Honor.

5 I think, you know, one of the things Mr. Nalven  
6 just referenced, which I think would be useful for this  
7 request, and also Requests 26 and 52, which go to the  
8 mitigation of damages theory the defendants have, if we  
9 could get Mr. Nalven as soon as possible organizational  
10 charts within these different Medicaid agencies so we could  
11 talk about, like, the source and people --

12 THE COURT: And have you made the actual request  
13 for that?

14 MR. HOBART: I believe we have, your Honor.  
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15 THE COURT: Yes.

16 MR. HOBART: We would be able to negotiate. His  
17 document collection, really, like how many people get to go  
18 to him and get their documents. If we narrow the sources,  
19 this becomes a much more manageable process.

20 THE COURT: All right. See if you can sit down  
21 and do that.

22 All right. The final motion is 1634, which is  
23 Glaxo's motion for protective order to prohibit the  
24 depositions of Attorneys Bartels and Carter.

25 MR. HOBART: Yes, your Honor.

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1 If I could just spend a couple minutes providing  
2 the Court with some of the context and background to this  
3 particular dispute, I think that would, uh, would serve  
4 everybody well.

5 The -- before -- before I even get into the  
6 background, I believe that the law is fairly clear in this  
7 area. The deposition of lawyers and opposing counsel in  
8 particular is frowned upon. There's an 8th Circuit case  
9 that was decided in 1986 that sets forth a three-part test,  
10 three-prong test, and it puts the burden on the party  
11 seeking to depose the lawyers to establish three things, to  
12 establish, you know, a limited set of circumstances where a  
13 deposition's appropriate.

14 And that three-prong test is as follows: First,  
15 the plaintiffs would have to demonstrate that no other  
16 means exists to obtain the information they are seeking;